Supreme Court, U.S.
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No. 02-827

IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORP.,

Petitioner,

v.

SHELBY D. SKAGGS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

This is solely a state law wrongful discharge case with no Federal Labor law implication.

CORRECTION OF FACTS

Mr. Skaggs did not "accept" a four-percent Permanent Partial Disability award. He was awarded same and appealed the award. Petitioner further quotes from the Order granting Summary Judgment which states:

> Although Skaggs had reached his maximum degree of medical improvement, he was not able to return to his regular job as a motorman. A functional capacity evaluation showed that Skaggs could engage in light work, but could not return to his previous position either with or without reasonable accommodations for his condition. App. At 26.

This statement is clearly not factual. There is no evidence to show that Mr. Skaggs could not return to his previous position with or without accommodation. The Supreme Court of Appeals did not agree with this finding. The employer never considered accommodations. The evidence of record also showed that Mr. Skaggs could return to two of his previous positions with Eastern.

The problem with Eastern's Workers' Compensation Program which is unstated in the facts but was clear to the West Virginia Supreme Court is that the program did not follow the law. Eastern only used rehabilitation to fire workers and did so under an unwritten and inviolable policy which was contrary to West Virginia law.

Mr. Skaggs was fired the moment he agreed to rehabilitation services. The United Mine Workers of America contract had no role in his termination.

I.

THE PETITION IS PREMATURE. THERE IS NO FINAL DECISION

The decision of the West Virginia Supreme Court remanded the case to the trial Court. There is no finality at this time and so the appeal should be denied.

II.

THE PETITION INCORRECTLY CITES AND ARGUES THE LAW

Petitioners argue that because § 23-5A-3, West Virginia Code is like the Massachusetts statute in *Biagini v. Berkshire Concrete Corporation,* 190 F. Supp. 2d 170 (U.S.C.S. Mass), that pre-emption by 29 U.S.C. § 185 is appropriate. They are absolutely wrong. Mr. Skaggs' case was brought pursuant to 23-5A-1, Code of West Virginia which has no provision deferring to the labor contract. The West Virginia Supreme Court did not even comment upon the pre-emption argument because it was not a reasonable argument.

III.

THE COLLECTIVE BARGAINING AGREEMENT IN THIS CASE IS NOT IMPLICATED NOR DOES IT NEED TO BE INTERPRETED IN ORDER TO RESOLVE MR. SKAGGS CASE

The collective bargaining agreement is very remotely involved in this case. A form letter was sent to Mr. Skaggs telling him he was terminated. Petitioner's employees however agreed that Mr. Skaggs' termination was based upon his agreement to accept voluntary vocational rehabilitation benefits.

The whole argument which related this case to *Biagini v. Berkshire Concrete Corporation*, 190 F. Supp. 2d 170 (D. Mass. 2002). *Troconis v. Lucent Technologies, Inc.*, 160 F. Supp. 2d 150 (D. Mass. 2001) and *Martin v. Shaw's Supermarkets, Inc.*, 105 F.3d 40 (1st Cir. 1997) is without any merit because as noted above, West Virginia did not as Massachusetts, make its statutes depend upon their not being "inconsistent" with a labor agreement, at least not in the statute upon which this case turned.

This case is clearly more like *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994). In this case like in *Hawaiian Airlines,* supra, the law does not pre-empt "non-negotiable" rights conferred on individuals' employees as a matter of state law.

None of this Court's jurisprudence is so broad as to state that every dispute which an employer and an employee have is pre-empted when there is a labor contract in existence and that is the argument put forth herein by petitioner. This Court

has been very careful to leave matters of state law in the state Courts and only pre-empts where there is a serious contractual implication.

The West Virginia Supreme Court in *Yoho v. Triangle PWC, Inc.*, 336 S.E.2d 204 (1985) and the United States District Court in *Messenger v. Volkswagon of America, Inc.*, 585 F. Supp. 565 (S.D.W.Va. 1984) considered whether actions brought under § 23-5A-1, Code of West Virginia for discrimination were preempted and decisively decided that they were not. Those cases are still correct and should lead this Court to deny the Petition in this case.

The Petitioner argues that the contracts seniority provisions need to be interpreted in some manner or other in order to determine Mr. Skaggs rights. They are clearly wrong. They might have an argument in a different circumstance, but here, there is solely an issue of state law.

There are three facts which must be proven to make out a prima facie under § 23-5A-1, Code of West Virginia which states:

> No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter.

Those facts to be proven under the case law are:

1) That an on the job injury was sustained;

2) That proceedings were instituted under the Workers' Compensation Act, and;

3) That the filing of the Workers' Compensation claim was a significant factor in the employee's discharge, *Powell v. Wyoming Cablevision, Inc.*, 184 W.Va. 700, 403 S.E.2d 717 (W.VA. 1991).

The only dispute before the Court below was on point 3. There is no conceivable way that United Mine Workers' of America contract has any role in such a state law determination.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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